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TEXAS CIVIL PROCEDURE

by

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AS WAS done in the *Survey* article last year,[1] a limited number of cases have been selected for textual discussion with principal emphasis on supreme court decisions. A few civil appeals rulings on matters which may be of particular interest also have been included. The concluding footnote contains partial selections of the literally hundreds of 1967 cases that involve some facet of procedural law.

I. JURISDICTION

Jurisdiction over the Person. Although Texas authorized a form of special appearance under rule 120a in 1962, the last five years have brought relatively few appellate decisions interpreting either this rule or the related long arm statute, article 2031(b).[2] One of the more significant Texas cases last year was *Crothers v. Midland Products Co.*,[3] decided by the Houston court of civil appeals. Both the issues of burden of proof under rule 120a and doing business under article 2031(b) were discussed.

The court's treatment of the minimal contacts doctrine and article 2031(b) deserves comment. As the court implicitly recognized,[4] when in personam jurisdiction is sought under a long arm statute, the cause of action sued upon must relate to the minimal contact within such state.[5] Conversely, when a corporation is generally doing business in a state, even though not licensed therein and not having a resident agent appointed for service, it is subject to in personam jurisdiction for any transitory cause of action, even though the action has no relationship to the state.[6] In upholding jurisdiction, the court noted not only that the cause of action was related to the Texas contacts, but also that other business activities of the corporation occurred in Texas, though such activities were not sufficiently extensive to constitute generally doing business.[7] While the court cannot be faulted for being chary, the opinion perhaps reflects the view that article 2031(b) will be construed more narrowly than some suppose. By comparison, in another case a sister state long arm default judgment was held void when sued upon in a Texas court because the contacts were not sufficient to permit jurisdiction.[8]

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[1] VanDercreek, *Texas Civil Procedure, Annual Survey of Texas Law*, 21 SW. L.J. 155 (1967).

[2] TEX. REV. CIV. STAT. ANN. art. 2031(b) (1964). *See*, 2 R. MCDONALD, TEXAS CIVIL PRACTICE § 9.05 (Supp. 1967).

[3] 410 S.W.2d 499 (Tex. Civ. App. 1967). For further discussion, see Larsen, *Conflict of Laws*, this *Survey*, at footnote 64.

[4] *Id.* at 501.

[5] Hanson v. Denckla, 357 U.S. 235 (1958); McGee v. International Life Ins. Co., 355 U.S. 220 (1957); International Shoe Co. v. Washington, 326 U.S. 310 (1945).

[6] Perkins v. Benguet Consol. Mining Co., 342 U.S. 437 (1952).

[7] 410 S.W.2d at 503. Such miscellaneous and unrelated contacts could be used to show "purposeful acts" and the intent to enjoy the privileges of doing business in the forum state. *See* note 8 *infra*.

[8] Hamilton v. Newbury, 412 S.W.2d 801 (Tex. Civ. App. 1967) (Action to enforce Montana

In the second issue in *Crothers*, the court, relying to a substantial extent on Professor Thode's law review article,[9] concluded that the defendant had the burden of proof under rule 120a. This holding was based in part on the reasoning that a special appearance is a plea in abatement and as such is a "disfavored" plea.[10] Additionally, the court relied upon the traditional Texas concept that every appearance constitutes a general appearance, thereby requiring an answering defendant to plead and prove that he comes within the exception.[11] While the Texas Supreme Court may so hold, if and when the burden of proof question is presented, there are some counter arguments which at least suggest that the burden of producing evidence and the burden of persuasion should not necessarily both be visited upon the defendant. First, generally, although certainly not always, the burden of proof is placed on the positive side of an issue, *i.e.*, the plaintiff should show that the defendant is doing business rather than the defendant show that he is not doing business. Secondly, as a practical manner, the defendant will offer evidence only to show what it does not do within the state. This in turn will force the plaintiff to produce evidence of what business the defendant has done within the state.[12] Also, as a general rule, a party who invokes the court's jurisdiction has the obligation to sustain it. This has been applied to jurisdictional fact issues under the federal rule.[13] In another proceeding,[14] the same court of civil appeals held that the failure of the plaintiff's petition to allege ultimate facts showing the defendant subject to jurisdiction under article 2031(b) rendered a default judgment invalid in a direct attack.[15] The cases seem inconsistent.

A related problem arises as to whether the Texas view of burden of

default judgment. The note was executed in North Dakota by a Texas borrower who had not transacted business in Montana since 1950 and had not been served with process in Montana. Further, the note was not payable in Montana.). *See also* Sun-X Int'l Co. v. Witt, 413 S.W.2d 761 (Tex. Civ. App. 1967) *error ref. n.r.e.* (Defendant was resident of California and had no office, agents, or employees in Texas. All negotiations with Texas corporations occurred in California. The court held that contract provisions stating that the contract would not be valid until accepted by the plaintiff corporation in Texas and that the contract would be construed by the laws of Texas did not constitute "purposeful acts" which would satisfy requirements of "minimal contacts.")

[9] Thode, *In Personam Jurisdiction: Article 2031(b), The Texas "Long Arm" Jurisdiction Statute, and the Appearance To Challenge Jurisdiction in Texas and Elsewhere*, 42 TEXAS L. REV. 278, 319, 320 (1964).

[10] 410 S.W.2d at 501.

[11] *Id.*

[12] The appellant in *Crothers* alleged that it was a New Jersey corporation, that it had never qualified to do business in Texas, that it had never done business in Texas, that it had never expressly or impliedly appointed an agent in Texas to receive service of process, that it had no assets of any kind in Texas, nor any employees residing in Texas, and, therefore, was not subject to the jurisdiction of the court. *Id.* at 500. For further discussion, see Larsen, *Conflict of Laws*, this *Survey*, at footnote 64.

[13] *See* Shaffer v. Coty, Inc., 183 F. Supp. 662 (S.D. Cal. 1960) and cases cited therein.

[14] Firence Footwear Co. v. Campbell, 411 S.W.2d 636 (Tex. Civ. App. 1967) *error ref. n.r.e. See also* Aetna Cas. & Sur. Co. v. Dobbs, 416 S.W.2d 869 (Tex. Civ. App. 1967).

[15] *Cf.* Thode, *supra* note 9, at 319: "The language of the rule clearly places on the defendant the burden of pleading lack of jurisdiction. Although not spelled out as specifically as might be desired, the burden of producing evidence and the burden of persuasion are both on the defendant." Thode here is discussing the requirements of rule 120(a) and not that of the plaintiff's petition. As to the latter, Thode states: "There is no pleading burden on the plaintiff to allege jurisdictional facts as such." *Id.* at 321. Such position is contrary to the instant case and, *e.g.*, Walker Mercantile Co. v. J. R. Raney Co., 154 S.W. 317 (Tex. Civ. App. 1913).

proof would be applicable in federal court under *Erie*[16] principles if service of process was obtained using article 2031(b), as authorized by federal rule 4(e).[17] Perhaps this situation can be distinguished from service under other provisions of federal rule 4. Under those provisions, which do not incorporate a state long arm statute, the United States Supreme Court has held that the federal test for mode of service controls over *Erie* considerations.[18] Even though *Erie* controls burden of proof on substantive issues,[19] the federal courts might well hold that once the defendant properly objects to jurisdiction over the person, the plaintiff bears the risk of nonpersuasion, or burden of proof.

Jurisdiction over Subject Matter.

Habeas Corpus. Although there were no significant supreme court cases involving jurisdiction over the person decided during the past year, the court did resolve a number of jurisdictional issues. The docket of the supreme court's original habeas corpus proceedings, involving cases where custody was ordered for violation of an order in a civil proceeding, has increased markedly in the last few years. In federal practice habeas corpus is a civil action,[20] but in Texas with its dual system of civil and criminal courts, there exists both a "civil" and a "criminal" habeas corpus. The Texas Supreme Court possesses a limited jurisdiction over "civil" cases. Thus, in *Ex parte Hofmayer*[21] the court dismissed the petition of a minor who was being detained in the Mountain View School for Boys pursuant to an order of the juvenile court:

> [T]he circumstance that the cause out of which a restraint of a person's liberty arises may be classified as a civil case, is not sufficient to vest this Court with habeas corpus jurisdiction. Under Article 1737, Vernon's Ann. Tex. Stats., our jurisdiction to issue an original writ of habeas corpus extends only to those causes in which 'a person has been confined *for violating an order, judgment or decree in a civil cause,*' and we are without power to inquire into the legality of restraint imposed for some other reason.[22]

The Texas Supreme Court's habeas corpus jurisdiction does extend to many domestic relations squabbles. *Ex parte Hatch*[23] and *Ex Parte Mullins*[24]

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[16] Erie R.R. v. Thompkins, 304 U.S. 64 (1938).

[17] FED. R. CIV. P. 4(e) states:

> Whenever a statute or rule of court of the state in which the district court is held provides (1) for service of a summons, or of a notice, or of an order in lieu of summons upon a party not an inhabitant of or found within the state, or (2) for service upon or notice to him to appear and respond or defend in an action by reason of the attachment or garnishment or similar seizure of his property located within the state, service may in either case be made under the circumstances and in the manner prescribed in the statute or rule.

[18] Hanna v. Plumer, 380 U.S. 460 (1965).

[19] Cities Serv. Oil Co. v. Dunlap, 308 U.S. 208 (1939).

[20] United States v. Hayman, 342 U.S. 205 (1952). *See* 7 J. MOORE, FEDERAL PRACTICE ¶ 81.05(4) (2d ed. 1955).

[21] 420 S.W.2d 137 (Tex. 1967).

[22] *Id.* at 138 (emphasis in original).

[23] 410 S.W.2d 773 (Tex. 1967). For further discussion, see Smith, *Family Law*, this *Survey*, at footnote 52.

[24] 414 S.W.2d 455 (Tex. 1967). For further discussion, see Smith, *Family Law*, this *Survey*, at footnote 48.

reiterated the rule that jurisdiction for hearing a motion to change or amend a child support order is in the court originally granting the divorce. Consequently, a contempt order of any other district court is void and may be set aside by the supreme court on habeas corpus. A more complicated jurisdictional child support issue was involved in *Pelej v. Williams*.[25] This case, a suit by a non-resident against a temporary resident of Texas, concerned an attempt to increase child support payments which had been ordered in a sister state divorce judgment. The court stated that the independent proceedings brought under article 2338-9 should be dismissed,[26] noting that any relief which might exist could be sought under article 2328b-4.[27]

The legislature might well consider vesting habeas corpus jurisdiction, at least in domestic relations cases, in the courts of civil appeals. Certainly, considering the importance and need of the supreme court to carefully consider applications for writ of error, the added jurisdictional appendage to consider whether a non-supporting father should be released from jail is not essential to the jurisprudential responsibility of the state's highest civil court. The need for immediate review of contempt confinements could be handled by the fourteen courts of civil appeals without creating an onerous burden.

Mandamus. Distinguished from its limited habeas corpus power, where original mandamus jurisdiction is sought, the Texas Supreme Court has jurisdiction even in criminal proceedings to the exclusion of the court of criminal appeals.[28] For example, in the Jack Ruby trial a mandamus proceeding was filed in the supreme court.[29] In *Lawrence v. State*[30] the supreme court, exercising mandamus jurisdiction, refused to order a judge of a

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[25] 11 Tex. Sup. Ct. J. 119 (1967).

[26] TEX. REV. CIV. STAT. ANN. art. 2338-9 (1964).

[27] TEX. REV. CIV. STAT. ANN. art. 2328b-4 (Supp. 1967).

[28] Stakes v. Rogers, 165 S.W.2d 81 (Tex. 1942) and cases cited therein hold that the mandamus power of the Texas Supreme Court extends to "criminal as well as in civil proceedings." *See* Milliken v. Jeffrey, 117 Tex. 134, 299 S.W. 393 (1927) and *In re* Milliken, 299 S.W. 433 (Tex. Crim. App. 1927). The Texas Court of Criminal Appeals has consistently held that it does not have original mandamus jurisdiction over criminal proceedings, only ancillary jurisdiction in aid of its jurisdiction by appeal or habeas corpus and only then after such jurisdiction has attached. *In re* Firmin, 131 S.W. 1116, 1118 (Tex. Crim. App. 1910) (no jurisdiction) (dicta); Eaves v. Landis, 258 S.W. 1056 (Tex. Crim. App. 1924) (no jurisdiction); *In re* Williams, 281 S.W. 208 (Tex. Crim. App. 1926) (no jurisdiction); *In re* Boehme, 259 S.W.2d 201, 203 (Tex. Crim. App. 1953) (no jurisdiction) (dicta). *See* note 29 *infra*.

[29] *See* Ruby v. Brown, 7 Tex. Sup. Ct. J. 244 (1964) (motion for leave to file petition for writ of mandamus overruled). For a totally erroneous view of the mandamus jurisdiction of the Texas Supreme Court and Court of Criminal Appeals, see J. KAPLAN & J. WALTZ, THE TRIAL OF JACK RUBY 101 (1965) in which they state in reference to the original mandamus matter in the Ruby trial: "In the first place, the Texas Supreme Court, unlike the high courts of all other states, has no criminal jurisdiction. The proper court of this essentially criminal motion would have been the Texas Court of Criminal Appeals." It is not known whether the failure of the two Monday morning quarterbacks is due to their general nescience of Texas law or inability to do even cursory research. *See, e.g.*, 37 TEX. JUR. 2d *Mandamus* § 64 (1962): "The jurisdiction of the supreme court to issue a writ of mandamus . . . may be exercised in criminal as well as civil proceedings."; *id.* § 68: "The court [of criminal appeals] does not have general power to issue writs of mandamus, and may do so only when necessary to enforce its own jurisdiction, or to insure the effective exercise of its original power to issue writs of habeas corpus. . . . But it has no authority in this regard until its appellate jurisdiction attaches." *See* note 28 *supra*.

[30] 412 S.W.2d 40 (Tex. 1967).

criminal district court to proceed to trial since the relator was then confined in a federal correctional institute.

The bifurcation of criminal and civil judicial systems each headed by a separate court of last resort is not well served by the present allocation of original mandamus jurisdiction. Although mandamus is generally classified as a civil remedy, the same is true of habeas corpus. But, as has been noted, the court of criminal appeals exercises both original and appellate habeas corpus jurisdiction for confinement arising out of criminal proceedings. Since a separate criminal appellate court appears to be a permanent Texas fixture, the court should be vested with original mandamus jurisdiction in all criminal matters and not merely the ancillary mandamus powers it now possesses.[31]

Collateral Attacks and Full Faith and Credit. A few years ago, Professor Hodges wrote a comprehensive treatment of collateral attacks and void judgments under Texas law.[32] The area is immersed in technicalities and not without considerable confusion. As the bench and bar well know, a Texas judgment regular on its face is presumed valid when subjected to a collateral attack. Usually the presumption is conclusive, thus precluding a party from going behind the judgment to dispute jurisdictional facts.[33] But in reference to the judgment of a sister state, Texas has not chosen to indulge in such conclusive presumptions.[34] While these judgments are protected by the full faith and credit clause of the Federal Constitution, a party who has not appeared (and thus is not bound by res judicata)[35] is permitted to contest jurisdiction.[36] Such attacks generally are predicated upon a lack of jurisdiction over the person, *e.g.*, on the question of personal service under a long arm statute or on the question of domicile as a prerequisite to granting a divorce.[37]

A recent civil appeals decision considered the domicile question,[38] but the holding is probably applicable to any jurisdictional attack on a sister state judgment.[39] During the pendency of the husband's Texas divorce

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[31] *See* note 28 *supra.*

[32] Hodges, *Collateral Attacks on Judgments*, 41 TEXAS L. REV. 163 (1962); Hodges, *Collateral Attacks on Judgments*, 41 TEXAS L. REV. 499 (1963).

[33] *E.g.*, Martin v. Burns, Walker & Co., 80 Tex. 676, 16 S.W. 1072 (1891); Crawford v. McDonald, 88 Tex. 626, 33 S.W. 325 (1895). *But cf.* O'Boyle v. Bevil, 259 F.2d 506 (5th Cir. 1958).

[34] W. T. Rawleigh Co. v. Little, 32 S.W.2d 214 (Tex. Civ. App. 1930) *error ref.*

[35] Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522 (1931).

[36] *See* note 39 *infra.*

[37] *See* note 39 *infra.*

[38] Burleson v. Burleson, 419 S.W.2d 412 (Tex. Civ. App. 1967). For further discussion, see McKnight, *Matrimonial Property*, this *Survey*, at footnote 50.

[39] Ordinarily, the jurisdictional fact issue in the sister state divorce judgment will be domicile; the jurisdictional fact issue in the sister state in personam judgment against a non-resident not served within the state will be jurisdiction over the person.

The problems in making a collateral attack on the sister state judgment involve res judicata as implemented by the full faith and credit clause. *See* 1B J. MOORE, FEDERAL PRACTICE ¶ 0.406 (1965). Where the defendant appears, he is estopped under the doctrine of res judicata from attacking the jurisdictional fact issue of the plaintiff's domicile in a divorce suit and that of jurisdiction over the person in an in personam proceeding. Divorce: Sherrer v. Sherrer, 334 U.S. 343, 351-52 (1948); in personam: Baldwin v. Iowa Traveling Men's Ass'n, 283 U.S. 522 (1931). Thus for a defendant to be in a position to make a successful collateral attack based on either of

suit, the wife initiated and obtained a final Nevada divorce decree. When the wife plead the Nevada judgment in the Texas suit, the husband, who had not appeared in the Nevada proceeding, argued that the judgment was void because the wife was not a domiciliary of Nevada. On this theory the trial court rendered judgment for the husband. The court of civil appeals found that sufficient evidence existed to support such a determination. Nevertheless, the court reasoned that the husband was barred from attacking the Nevada judgment because he had failed to avail himself of Nevada rule 60(b).[40] Under this rule, substantially the same as federal rule 60(b),[41] Nevada Supreme Court decisions[42] would permit an attack by such an ancillary motion on the basis of "intrinsic" fraud. The court relied upon two recent Texas cases. The first was a civil appeals decision[43]

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the two above jurisdictional facts, the proceedings must have ended in a default judgment in which the defendant did not appear. Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957). *See also* Williams v. North Carolina, 317 U.S. 287 (1942) [*Williams (I)*]; Williams v. North Carolina, 325 U.S. 226 (1945) [*Williams (II)*]. Where a non-resident defendant is personally served within the sister state rendering an in personam judgment, any collateral attack on such proceeding would be limited to jurisdictional fact issues other than jurisdiction of a person, with the possible exceptions of impeaching the sheriff's return, 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405, at 642 (1965), or the establishment that service (jurisdiction) was procured by fraud, Wyman v. Newhouse, 93 F.2d 313 (2d Cir. 1937), *cert. denied*, 303 U.S. 664 (1938).

In reference to quasi in rem proceedings, the defaulting and non-appearing defendant may also be able to successfully collaterally attack a sister state judgment on the basis that the notice was inadequate to meet procedural due process. City of New York v. New York, N.H. & H.R.R., 344 U.S. 293 (1953). In the migratory divorce problem, in personam jurisdiction is not required of both spouses (except for property or support judgments, *see* Vanderbilt v. Vanderbilt, *supra*). But it is generally considered that domicile of the plaintiff seeking the divorce must exist in such state. *See Williams (I)* and *Williams (II) supra* and A. EHRENZWEIG & D. LOUISELL, JURISDICTION IN A NUTSHELL § 8 (2d ed. 1968). Thus, jurisdiction over the person is not required of the defendant spouse, but merely notice. So, if such defendant spouse were personally served within the sister state and did not appear, such service would clearly meet the notice requirements and preclude a successful collateral attack on such basis, but would permit such defendant to urge on collateral attack the jurisdictional fact issue of domicile.

Jurisdictional attacks are necessary on default judgments to preclude the res judicata effect of bar and merger, but not for collateral estoppel. Professor Moore has stated the general rule, and the one which is applicable under full faith and credit, that the principles of bar and merger under the doctrine of res judicata do apply to default judgments (which have no collateral estoppel effect). To invoke the doctrine of collateral estoppel in default cases is not only an oppressive application of the doctrine, but it misconceives the nature of a default judgment.

On the difference between bar and merger, and collateral estoppel, see RESTATEMENT OF JUDGMENTS § 78 (1942) and Lawlor v. National Screen Serv. Corp., 349 U.S. 322, 326 (1955):

> Thus, under the doctrine of res judicata, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, such a judgment precludes relitigation of issues actually litigated and determined in the prior suit, regardless of whether it was based on the same cause of action as the second suit.

[40] NEV. R. CIV. P. 60(b) provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Fraud, etc. . . . (2) fraud, misrepresentation or other misconduct of an adverse party which would have theretofore justified a court in sustaining a collateral attack upon the judgment; (4) . . . The motion shall be made within a reasonable time, and for reasons (1) and (2) not more than six months after the judgment, order or proceeding was entered or taken. . . . This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

[41] FED. R. CIV. P. 60(b).

[42] Confer v. 2nd Judicial District Court, 49 Nev. 18, 234 P. 688 (1925); Colby v. Colby, 78 Nev. 150, 369 P.2d 1019 (1962).

[43] Marsh v. Millward, 381 S.W.2d 110 (Tex. Civ. App. 1964) *error ref. n.r.e.*

which, from the extract quoted by the court, appeared to be exactly on point. Unfortunately, though, the defendant therein was personally served in the sister state that rendered the default judgments.[44] For reasons unknown, this decisive fact was neither mentioned nor discussed by the court.[45] The second authority relied upon was the supreme court's holding in *O'Brien v. Lanpar Co.*[46] *O'Brien* is likewise inapplicable since the issues therein concerned a construction of the Illinois long arm statute (an issue foreclosed by a decision of the Illinois Supreme Court)[47] and the federal constitutionality of the statute as construed (a matter of federal law upon which the Texas court followed United States Supreme Court decisions).[48]

With deference to the court of civil appeals the rules regarding collateral attacks for intrinsic fraud as to a defense on the merits are not necessarily applicable to the existence of jurisdiction or fraud, extrinsic or intrinsic, which relates to jurisdiction. Indeed, the full faith and credit clause may well bar a collateral attack on a sister state judgment which alleges intrinsic fraud on the merits,[49] but it certainly does not bar a collateral attack where the issues relate to jurisdiction over a person and no appearance has been made nor service obtained within the sister state.[50] The existence or non-existence of a remedy to attack a Nevada judgment in Nevada is not decisive or probably even relevant with respect to a collateral attack on such judgment under the full faith and credit clause. In the latter situation the issue, if not foreclosed by the doctrine of res judicata, is whether the judgment is void for want of jurisdiction.[51]

Another civil appeals case[52] held void a Montana default judgment rendered on a promissory note which had not been executed in Montana and which was not expressly payable in Montana. The court, after carefully reviewing the facts, concluded that the case did not fall within the Montana long arm statute. The significance of this case lies in the recognition by the court that the construction of the sister state statute is the

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[44] *Id.* at 112:

> On October 19, 1960, appellee sued appellant . . . in . . . Wyoming. Appellant was duly served with process in Wyoming on October 20, 1960. On May 15, 1961, appellant having failed to answer the suit, the Court rendered a default judgment against appellant.
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> On January 11, 1962, appellee sued appellant . . . in . . . Colorado, on the Wyoming judgment. Appellant was personally served with process in Colorado . . . . Default judgment was rendered against appellant on October 8, 1962.

[45] *See* note 39 *supra.*

[46] 399 S.W.2d 340 (Tex. 1966).

[47] Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961); Nelson v. Miller, 11 Ill. 2d 378, 143 N.E.2d 673 (1957).

[48] *See* note 5 *supra.*

[49] Midessa Television Co. v. Motion Pictures for Television, 290 F.2d 203, 205 (5th Cir.), *cert. denied*, 368 U.S. 827 (1961). The fifth circuit stated:

> While a distinction is made between extrinsic and intrinsic fraud . . . this becomes irrelevant on a collateral attack on a judgment after it is determined that the court had jurisdiction [over the person of the defendant]. The matter of jurisdiction is the sole point of inquiry. On this premise of jurisdiction, the courts have held that a ground of fraud cannot be pleaded in an action in one state on a judgment obtained in another. Simmons v. Saul, 138 U.S. 439 (1891).

[50] Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957); Williams v. North Carolina, 325 U.S. 226 (1945) [*Williams (II)*].

[51] *See* note 39 *supra.* The court of civil appeals opinion is oblivious to the real issues involved.

[52] Hamilton v. Newbury, 412 S.W.2d 801 (Tex. Civ. App. 1967).

first issue to be decided; only when the long arm provision is applicable does the court reach the issue of the statute's federal constitutionality.

With reference to Texas judgments, the supreme court applied the established civil rules on collateral attack to judgments of traffic convictions in a driver's license suspension case.[53] The Department of Public Safety had relied upon duly certified abstracts of judgment; the driver claimed that such judgments were void and filed affidavits that he had not personally appeared in the convicting traffic court. The supreme court correctly reasoned that a suspension proceeding is civil in nature and that, even though the traffic convictions which were regular on their faces may have been voidable, or even void in a habeas corpus proceeding, they were immune in the suspension case from collateral attack.[54]

II. Appeals

In contrast to the relatively simple procedure in federal practice for perfecting appeals, the Texas system is filled with hard and fast requirements that can ensnare the wary as well as the unwary. An apt illustration in *Buttery v. Betts*,[55] an original mandamus proceeding, which arose out of the consolidation solely for trial purposes of two separate appeals to a district court by two unsuccessful applicants before the Savings and Loan Commission. Each applicant intervened in opposition in the other proceeding. Following rendition of judgments favorable to both applicants, the intervenor in one suit filed a motion for a new trial, complaining that the trials should have been consolidated for all purposes. The applicant therein then filed a motion in such proceeding, but not in the proceeding in which he had intervened, joining in the request for the new trial and also requesting a new trial in the consolidated case. The trial court granted new trials in both proceedings. The supreme court held that the trial court was without jurisdiction to grant a new trial in the second proceeding because the order was entered more than thirty days after entry of judgment.[56] The filing of a motion for new trial in one proceeding could not be considered in conjunction with the second proceeding which had been consolidated only for trial purposes. This is perhaps an unfortunate result, but one that is clearly supported by precedent.[57]

Indeed, when there is any doubt, the filing of a timely motion for new trial is certainly a safe course. Consider *St. Louis Southwestern Railway v. Duke*,[58] where the plaintiff moved for the trial court to refuse to enter judgment for the railroad-defendant because of irreconcilable conflicts in answers to special issues. The trial court denied this motion and later denied the plaintiff's subsequent motion for mistrial. Because it was thought a motion for new trial was not a prerequisite to appeal under these circum-

[53] Texas Dept. of Pub. Safety v. Casselman, 417 S.W.2d 146 (Tex. 1967).
[54] *Id.* at 147, 148.
[55] 11 Tex. Sup. Ct. J. 81 (1967).
[56] *Id.* at 93.
[57] *See* Buttery v. Betts, 11 Tex. Sup. Ct. J. 81 (1967).
[58] 413 S.W.2d 813 (Tex. 1967).

stances, the court of civil appeals heard the case and reversed, finding that the answers were in conflict. But, alas, the supreme court held that a motion for a new trial clearly was required and that the plaintiff's motion for mistrial which prayed for "another trial" on the basis of the conflict in issues did not constitute a premature and mislabeled (under rule 71) motion for new trial.[59] The court had no difficulty with the platitudes of rule 1 which proclaim a liberal interpretation of the rules to obtain substantial justice.[60] But one cannot fault the decision—it is in accord with the case authority.[61] It is merely the law that may be suspect. If Texas appellate procedure is so complicated that even judges of a civil appeals court do not know when an appeal has been perfected, perhaps some simplification is needed.

Of course, motions for new trials are certainly not the only areas of appellate procedure that cause difficulties. A frequent problem occurs when a trial court grants a judgment n.o.v. (motion for new trial in this instance is truly not required).[62] Suppose that on the appeal the appellee files "counter-points" but no "cross-points,"[63] and the court of civil appeals reverses the judgment n.o.v. but remands in the interest of justice for a new trial. Where stands the appellee? Minus a paddle:

> Normally, when a trial court has entered judgment notwithstanding the verdict and an appellate court concludes that this was in error it must reverse the judgment of the trial court and enter judgment in harmony with the verdict, *unless the appellee presents by cross-points* grounds sufficient to vitiate the jury's verdict, or to prevent an affirmance of the judgment had one been entered on the verdict.[64]
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> In 1957, rule 324 was amended to require the appellee to bring forward by cross-points in his brief in the court of civil appeals all complaints against the verdict and any judgment based thereon except for complaints that 'require the taking of evidence in addition to that adduced upon the trial of the cause.' The purpose of this amendment was to require a final disposition of the case by the appellant court, where a judgment notwithstanding the verdict is erroneously rendered by the trial court, on the basis of the record before it, and to order a remand only as to questions that require the taking of additional evidence, such as jury misconduct.[65]

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[59] *Id.* at 818, 819.

[60] TEX. R. CIV. P. 1, states:

> The proper objectives of rules of civil procedure is [are] to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction.

[61] *See* Duke v. St. Louis Sw. Ry., 413 S.W.2d 813 (Tex. 1967).

[62] TEX. R. CIV. P. 329(b).

[63] 'Counter-Points' are basically reply points as prescribed in the first clause of Rule 420: 'The brief of the appellee shall *reply* to the *points* relied upon by the appellant . . . .' These assist the appellate court in finding the answers given to the points of the appellant. From the standpoint of the advocate, their function is to show that the point or points of the opposite party are not valid. 'Cross-points' are really 'points' which are used to preserve the error committed by the trial court. They are the means by which an appellee may bring forward complaints of some ruling or action of the trial court which the appellee alleges constituted error as to him. They are called for under the second clause of Rule 420 . . . .

Jackson v. Ewton, 10 Tex. Sup. Ct. J. 218, 219 (1967).

[64] *Id.* at 219.

[65] *Id.*

III. VENUE

The limited jurisdiction of the supreme court on venue matters is a valuable buffer from the inundation of cases that otherwise would flow. The most frequent ground of jurisdiction urged is that a conflict exists between the holding of the lower court and a *prior* decision of another court of civil appeals. The court in *Barber v. Intercoast Jobbers & Brokers*[66] had occasion to clarify the question of what constitutes a "prior decision," *viz.*, is it the date of the opinion of the asserted conflicting civil appeals decision or the date such judgment becomes final by expiration of the time limits for rehearing?

> It is settled that 'a prior decision' which can serve as a basis for jurisdiction in the supreme court because of conflicts, must be a decision that was rendered before and not subsequent to that of the case in which the petition for writ of error is filed. . . . As long as a decision is subject to withdrawal or change, it cannot be known whether a conflict between decisions will actually exist. It was not, therefore, until the time expired for filing a motion for rehearing that *Buckaloo* became a final decision and as such afforded a basis for the assertion of its conflict with a later decision. . . . We conclude, therefore, that a conflict with 'a prior decision' means a decision that is final.[67]

Probably the most frequently litigated exception to the general venue provision is negligence (section 9a),[68] which applies to automobile accidents. The venue facts include the elements of liability, but it has not been clear whether proof of some damage need also be established. In resolving a conflict between the Eastland and Texarkana courts, *Penix v. Spoon*,[69] an error refused opinion, held the extent of the injury or damage suffered by the plaintiff constitutes no part of a venue fact under exception 9a.

Where the plaintiff non-suits after a filing of a plea of privilege and then subsequently refiles his action, the previous plea of privilege is said to be res judicata. It is really not "res judicata" in the traditional concept of that term, but that is the label usually affixed. The label seems an appropriate choice in that res judicata is a term well known but seldom clearly understood and comes as close as anything to meaning all things to all men. In *Texas Highway Department v. Jarrell*[70] the defendant urged the res judicata effect of his previous plea of privilege by a plea of abatement. The court noted that a plea of res judicata (in the traditional sense) was really a plea in bar but, of course, in the venue sense a plea of res judicata can not be raised by a plea in bar (or a mislabeled plea in abatement):

> We observe that a plea of res judicata is not a plea in abatement or a plea

[66] 417 S.W.2d 154 (Tex. 1967). For further discussion, see Ray, *Evidence*, this *Survey*, at footnote 26.

[67] *Id.* at 156, 157.

[68] TEX. REV. CIV. STAT. ANN. art. 1995, § 9a (1953).

[69] 418 S.W.2d 323 (Tex. Civ. App.) *error ref.*, 11 Tex. Sup. Ct. J. 69 (1967).

[70] 418 S.W.2d 486 (Tex. 1967).

to the jurisdiction, but is a plea in bar. . . . The three pleas have different objectives, and different consequences flow from their sustention.[71]

We attach no controlling effect to petitioner's erroneous styling of its plea of res judicata, and we treat the plea as a plea in bar. See Rule 71, Texas Rules of Civil Procedure. But petitioner seems also to have misconceived the posture of the case when the plea was filed. The plea of res judicata was directed only to an issue of venue, and petitioner had not raised an issue of proper venue by a plea of privilege as is required by Rule 86, Texas Rules of Civil Procedure. If petitioner had filed a plea of privilege and respondent had filed a controverting affidavit, proper venue of this case would have been placed in issue, and petitioner's plea that the judgment in [the prior action] was res judicata of respondent's right to maintain venue in Delta County would have been in order.[72]

Venue cannot be put in issue by pleas to the jurisdiction, pleas in bar, or pleas in abatement, but only by a plea of privilege.[73]

IV. POTPOURRI OF PROCEDURE

Among the various areas of procedural law which received attention by the supreme court was the troublesome question of whether, in a non-default judgment case, a new trial can be granted only on the liability issue. A negative answer was authoritatively supplied in *Eubanks v. Winn*.[74] This is a salutory result in that all defendants with a favorable damage verdict would like new trials only on liability and all plaintiffs with a favorable liability verdict would like a new trial only on damages. Conceptually, though, under the theory of Texas special issues and the restriction against telling the jury the effect of their answers, a new trial on only the liability issue or the damages issue would seem permissible. Under the general verdict system with an unblindfolded jury, a stronger argument against trying only the liability or damages issue could be made since it is suspected that the juries, in their attempts to do justice, practice a form of comparative negligence. The Texas rule is now opposite that in federal courts where a new trial can be granted on liability or damages.[75]

The troublesome special issue defect of commenting on the evidence or assuming a disputed fact, an inherent danger when drafting an issue using several evidentiary facts to make an ultimate issue, was again before the court in a heat exhaustion workmen's compensation case. In 1947 *Johnson v. Zurick General Accident & Liability Insurance Co.*[76] considered the following issue: "Do you find from a preponderance of the evidence in this case that the injury, if any you have found, was sustained by R. M. Johnson because of heat exhaustion experienced on or about July 18, 1945?"[77] The issue was held bad because it assumed the plaintiff did suffer

[71] *Id.* at 488.

[72] *Id.* at 488, 489.

[73] *Id.* at 489. *See* Lanier v. Looney, 2 S.W.2d 237 (Tex. Civ. App. 1928). The court in *Jarrell* disapproved Richardson v. Mohon, 157 S.W.2d 655 (Tex. Civ. App. 1941), and Roach v. Trinity Universal Ins. Co., 119 S.W.2d 127 (Tex. Civ. App. 1938) insofar as they held to the contrary.

[74] 420 S.W.2d 698 (Tex. 1967).

[75] *See, e.g.*, Gallo v. Crocker, 321 F.2d 876 (5th Cir. 1963); 6A J. MOORE, FEDERAL PRACTICE ¶ 59.06 (1965).

[76] 146 Tex. 232, 205 S.W.2d 353 (1947).

[77] *Id.* at 354.

heat exhaustion, a disputed fact question.[78] In *Commercial Standard Insurance Co. v. Allred*[79] the issue before the court was worded as follows: "Do you find from the preponderance of the evidence that Leroy Allred sustained an injury to his body as the result of a heat exhaustion on or about April 9, 1963?"[80] The court of civil appeals applied the ruling of the *Johnson* case.[81] The supreme court reversed and in so doing distinguished *Johnson* into obscurity, except, perhaps for an exactly identical issue.[82] It is hoped that the result portends an end to testing the validity of special issues by grammatical gyration of sentence structure which dubiously accomplishes the discarding of the jury verdict. When the average person can see no difference between two special issues, one of which purportedly assumes a fact which the other does not, it is difficult to discern how prejudicial error could have resulted. Subtle sophistications of English grammar are beyond the grasp of most college graduates, including certainly those who pass through law school, and is, probably, almost as meaningless to the average juror.

To this writer one of the most baffling problems in Texas jurisprudence concerns the difference between a prejudical and non-prejudical jury argument. In *Fidelity & Casualty Co. v. Johnson*[83] the supreme court struck down a jury argument because it "was an appeal to the jurors to decide the case in plaintiff's favor or to go to plaintiff and justify their decision."[84] Although both lower courts did not feel the argument so outrageous to warrant tossing out the jury verdict, the supreme court had no such difficulty. A related form of argument asking the jurors to follow the Golden Rule has been upheld by the supreme court.[85] The problem appears to be more paradoxical than logical.[86]

The question of mitigation of damages, after injury, has been troublesome in a number of Texas cases. The court in *Moulton v. Alamo Ambulance Service*[87] held that mitigation was not an affirmative defense which must be plead by a defendant in order to place the matter in issue; a

[78] *Id.* at 354-55. *But cf.* Eubanks v. Texas Employers' Ins. Ass'n, 151 Tex. 67, 246 S.W.2d 467 (Tex. 1952) where the following special issue was held good: "Do you find from a preponderance of the evidence that J. L. Eubanks sustained personal injuries during the first two weeks of January, 1945, as a result of being struck a blow on his head by a piece of timber?"

[79] 413 S.W.2d 910 (Tex. 1967).

[80] *Id.* at 911.

[81] Commercial Standard Ins. Co. v. Allred, 400 S.W.2d 778, 779 (Tex. Civ. App. 1966), *rev'd*, 413 S.W.2d 910 (Tex. 1967).

[82] Commercial Standard Ins. Co. v. Allred, 413 S.W.2d 910, 912 (Tex. 1967).

[83] 419 S.W.2d 352 (Tex. 1967).

[84] *Id.* at 355.

[85] Halepeska v. Callihan Interests, Inc., 371 S.W.2d 368, 386 (Tex. 1963).

[86] *See* R. McDONALD, TEXAS CIVIL PRACTICE § 13.09, at 1201 (1950):

> The distinctions which are hammered out in some of these cases are difficult if not impossible to justify, and as a result emphasis upon particular forms of expression has sometimes tended to make into a parrot the shrewd attorney who desires deliberately to skirt the edge, impelling him to recite by memory words which have been approved, but to recite them in a tone which makes them as prejudicial as other phrases which have been condemned. Added difficulty results from the fact that the improper argument varies in degree of potentiality of harm, so that sometimes it is reversible without objection or in spite of withdrawal, although in most situations the error has been or could have been cured by such an instruction.

[87] 414 S.W.2d 444 (Tex. 1967).

general denial by the defendant, if raised by the evidence, entitles him to an affirmative exclusion instruction.

> [W]e observe that the better practice generally would be to instruct the jury that in arriving at its answer to the issue it should not include any sum for physical and mental pain and suffering, loss of earning, etc., if any, proximately caused by failure of an injured person to care for and treat his injuries, if any, as a reasonable prudent person would in the similar circumstances.[88]

The supreme court has not resolved the troublesome problem of before injury mitigation, *e.g.*, the failure to use seat belts which has provoked argument of everything from assumption of risk to comparative negligence. The validity of various seat belt arguments is beyond the scope of this Article. But assuming that failure to use seat belts is properly admissible on the question of mitigation of damages (a big assumption), then the instant case would suggest it need not be specially plead and that it would be a matter covered by an instruction with the standard damage issues.

The potpourri footnote follows.[89]

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[88] *Id.* at 450.

[89] *Actions*: Cervantes v. Ramirez, 414 S.W.2d 233 (Tex. Civ. App. 1967) (trespass to try title); Edwards v. State *ex rel.* Lytton, 406 S.W.2d 537 (Tex. Civ. App. 1966) *error ref.* (quo warranto to have special judge removed); Kennelly v. Gates, 406 S.W.2d 351 (Tex. Civ. App. 1966) (consent judgment).

Bill of Review:

Condemnation Proceedings: Powell v. State, 410 S.W.2d 1 (Tex. Civ. App. 1966) *error ref. n.r.e.* (if judgment is not void on its face, plaintiff must allege no lack of diligence).

Court Official's Mistake: Mobley v. Rheem Mfg. Co., 410 S.W.2d 320 (Tex. Civ. App. 1966) *error ref. n.r.e.* (error in failing to strike case from dismissal docket, where trial court did not know of removal request, can only be corrected by a bill of review after judgment is final).

Citation: London v. Chandler, 406 S.W.2d 203 (Tex. 1966) (lack of date of issuance did not render a citation invalid).

Discovery: *Ex parte* Hanlon, 406 S.W.2d 204 (Tex. 1966) (privilege for insurance investigator); Wilson v. City of Port Lavaca, 407 S.W.2d 325 (Tex. Civ. App. 1966) *error ref. n.r.e.* (suit to enjoin collection of taxes—bank does not have to disclose amount of individuals' deposits); Guerra v. Pena, 406 S.W.2d 769 (Tex. Civ. App. 1966) (discovery in election contest).

Election of Remedies: International Shoe Co. v. Marcus, Inc., 410 S.W.2d 235 (Tex. Civ. App. 1966) *error ref. n.r.e.* (election between corporate and individual defendants).

Eminent Domain: Texas Elec. Serv. Co. v. Faudree, 410 S.W.2d 477 (Tex. Civ. App. 1966) *error ref. n.r.e.* (prior order of county judge in matter involving surface lease and in which condemnor not a party not controlling in eminent domain proceeding); Stappers v. State, 410 S.W.2d 470 (Tex. Civ. App. 1966) *error ref. n.r.e.* (conditional submission of market value of property before and after condemnation of a portion of property was proper).

Garnishment: Household Fin. Corp. v. Reyes, 408 S.W.2d 739 (Tex. Civ. App. 1966) *error dismissed* (writ properly quashed where amount of debt was contingent and uncertain).

Judgments:

Appeal: State Bd. of Water Eng'rs v. Slaughter, 407 S.W.2d 467 (Tex. 1966), *cert. denied*, 386 U.S. 944 (1967) (refusal of writ of error is not a ruling on points not urged as erroneous); Texas Dept. of Pub. Safety v. Casselman, 417 S.W.2d 146 (Tex. 1967) (improper for county court to allow collateral attack on convictions for moving traffic violations even though movant had not personally appeared in court when judgments of conviction were rendered); Continental Am. Life Ins. Co. v. McCain, 416 S.W.2d 796 (Tex. 1967) (reversed without granting writ of error); State Bd. of Medical Examiners v. Mann, 413 S.W.2d 382 (Tex. 1967) (dismissal of doctor's suit for failure to prosecute had effect of terminating Board's order cancelling his license under statute which provides for "trial de novo" on appeal to district court. TEX. REV. CIV. STAT. ANN. art. 4506 (Supp.

1967); Stacks v. East Dallas Clinic, 409 S.W.2d 842 (Tex. 1966) (where court of civil appeals remands instead of renders, and defendant did not seek a writ of error, supreme court cannot render but can only affirm decisions of appellate court); Yancy v. Texas Gen. Indem. Co., 417 S.W.2d 643 (Tex. Civ. App. 1967) (court of appeals not required to dismiss appeal because appellants file late brief); Manning v. Sears, Roebuck & Co., 417 S.W.2d 639 (Tex. Civ. App. 1967) *error ref.* (exceptions to trial court's procedures not preserved for review because not included in any assignment of error in motion for new trial); Hou-Tex Constr. Co. v. Williams, 417 S.W.2d 597 (Tex. Civ. App. 1967) *error ref. n.r.e.* (where party does not object to theory upon which court submitted measure of damages to jury, he cannot complain on appeal—TEX. R. CIV. P. 277-79, 324); Sonnier v. Texas Employers Ins. Ass'n, 417 S.W.2d 433 (Tex. Civ. App. 1967) (not abuse of discretion for trial court to sever causes of action which made inapplicable TEX. R. CIV. P. 251 that applications for continuance cannot be heard before defendant filed his answer); State v. Davenport, 417 S.W.2d 337 (Tex. Civ. App. 1967) *error ref.* (unnecessary that all party plaintiffs object to award in condemnation proceeding in order to perfect appeal); Stubblefield v. State, 417 S.W.2d 191 (Tex. Civ. App. 1967) (defect in appeal bond does not require dismissal when timely motion to amend is made); Schecter v. Folsom, 417 S.W.2d 180 (Tex. Civ. App. 1967) (erroneous judgment for attorney's fees reversed from rest of judgment and remanded); State v. Baker, 416 S.W.2d 898 (Tex. Civ. App. 1967) (jury argument held not to be harmful error); Montgomery Ward & Co. v. Brewer, 416 S.W.2d 837 (Tex. Civ. App. 1967) *error ref. n.r.e.* (jury argument deemed prejudicial and grounds for reversal); Rosenfield v. Pollock Realty Co., 416 S.W.2d 833 (Tex. Civ. App. 1967) (where testimony is conflicting, trial court's findings are binding on reviewing court); Lubbock Bail Bond v. Joshua, 416 S.W.2d 523 (Tex. Civ. App. 1967) (determination of courts of civil appeals as to damages are final); Nichols v. Acers Co., 415 S.W.2d 683 (Tex. Civ. App. 1967) *error ref. n.r.e.*, Rhoades v. Miller, 414 S.W.2d 942 (Tex. Civ. App. 1967), and Hall v. Tucker, 414 S.W.2d 766 (Tex. Civ. App. 1967) *error ref. n.r.e.* (all are to the effect that in the absence of findings of fact or conclusions of law, appellate court must affirm lower court's judgment if there is any evidence of probative force to support it on any theory authorized by law); Suarez v. Brown, 414 S.W.2d 537 (Tex. Civ. App. 1967) *error ref.* (dismissed for untimely filing even though district clerk's office closed on twentieth day); Shiflett v. Associated Oil & Gas Co., 412 S.W.2d 705 (Tex. Civ. App. 1967) (order overruling motion to quash an attachment is interlocutory and not appealable); Texas Dept. of Pub. Safety v. Morris, 411 S.W.2d 620 (Tex. Civ. App. 1967) (stay order of trial court relating to each separate cause of action until each should be tried on merits was interlocutory order and not appealable); Bruflat v. City of Fort Worth, 411 S.W.2d 387 (Tex. Civ. App. 1967) *error ref. n.r.e.* (error as to alleged conflict on jury findings which is not preserved is waived and cannot be raised first on appeal); Coastal States Crude Gathering Co. v. Strauch, 410 S.W.2d 945 (Tex. Civ. App. 1967) (partial summary judgment not appealable); Industrial Generating Co. v. Jenkins, 410 S.W.2d 658 (Tex. Civ. App. 1966) (only parties or their privies can appeal from adverse judgment); Thornton v. City of Kleberg, 410 S.W.2d 461 (Tex. Civ. App. 1966) (whether trial court abused its discretion could not be determined in absence of statement of facts); Carl Coiffure, Inc. v. Mourlot, 410 S.W.2d 209 (Tex. Civ. App. 1966) *error ref. n.r.e.* (failure to apply correct law to undisputed facts is an abuse of trial court's discretion); Luther v. Graves, 408 S.W.2d 242 (Tex. Civ. App. 1966) *error ref. n.r.e.* (probate court's approval of claim in guardianship proceedings must be directly appealed to district court and cannot be carried by certiorari); Archer v. Archer, 407 S.W.2d 529 (Tex. Civ. App. 1966) (court order decreeing child custody and alimony pendente lite is interlocutory and not appealable); Bailey v. Clark, 407 S.W.2d 520 (Tex. Civ. App. 1966) (five-day time limit for filing appeal in election contest is jurisdictional); Long v. Cosden Petroleum Corp., 407 S.W.2d 1 (Tex. Civ. App. 1966) (debtor's surety cannot raise on appeal same defense raised by debtor in trial court).

Equity: City of Amarillo v. Griggs Sw. Mortuary, Inc., 406 S.W.2d 230 (Tex. Civ. App. 1966) *error ref. n.r.e.* (injunction to prohibit enforcement of penal ordinance denied where remedy at law existed); Shoppers Fair of N. Houston, Inc. v. City of Houston, 406 S.W.2d 86 (Tex. Civ. App. 1966) *error ref. n.r.e.* (temporary injunction).

Judgments n.o.v.: Jackson v. Ewton, 411 S.W.2d 715 (Tex. 1967) (improper for court of civil appeals to remand after reversing a judgment notwithstanding verdict); Baucum v. Pyramid Life Ins. Co., 414 S.W.2d 535 (Tex. Civ. App. 1967) (not proper where there is evidence of probative value supporting verdict); Kirchner v. Van Skike, 410 S.W.2d 467 (Tex. Civ. App. 1966) (improper where there is any evidence of probative force and court must enter judgment in keeping with jury's findings).

Judgments Nunc Pro Tunc: Scott v. Scott, 408 S.W.2d 135 (Tex. Civ. App. 1966) *error dismissed* (error in divorce decree vesting title to cash surrender value of insurance policy in wife, instead of a personal judgment, cannot be corrected by a judgment *nunc pro tunc*).

Res Judicata: Cornell v. Cornell, 413 S.W.2d 385 (Tex. 1967) (California decision that husband had not contracted to pay alimony res judicata as to same issue in Texas); Burdette v. Culp, 410 S.W.2d 843 (Tex. Civ. App. 1967) (prior default judgment not res judicata where plaintiff first seeks damages in second suit); Kirkman v. Aircraftsmen, Inc., 408 S.W.2d 736 (Tex. Civ. App. 1966) (where plaintiff defended in prior suit upon same grounds upon which he sought recovery); Jenckes v. Mercantile Nat'l Bank, 407 S.W.2d 260 (Tex. Civ. App. 1966) *error ref. n.r.e.* (enactment of a new statute does not destroy effect of res judicata); Baker v.

Smith, 407 S.W.2d 4 (Tex. Civ. App. 1966) *error ref. n.r.e.* (plaintiff and defendants co-plaintiffs in earlier case); Hyde v. Hyde, 406 S.W.2d 225 (Tex. Civ. App. 1966) *error dismissed* (custody order in divorce action not barred by prior custody order).

Summary Judgment: Crain v. Davis, 417 S.W.2d 53 (Tex. 1967) (holding that defendant's motion should have been denied because affidavits contained only conclusions, and that plaintiff's plea that she was a "good person" was a meritorious defense in child custody case); Touchy v. Houston Legal Foundation, 417 S.W.2d 625 (Tex. Civ. App. 1967) *error granted* (summary judgment will be affirmed if properly sustainable on a ground not actually stated in motion); Rackley v. Model Markets, Inc., 417 S.W.2d 89 (Tex. Civ. App. 1967) *error ref. n.r.e.* (improper where genuine issue of material fact existed in slip and fall case); Terry v. Southeast Packing Co., 416 S.W.2d 624 (Tex. Civ. App. 1967) (improper where fact issue existed as to unseaworthy condition of vessel); Baumert v. Porter, 414 S.W.2d 527 (Tex. Civ. App. 1967) (failure to comply with provisions of TEX. R. CIV. P. 166-A); Gibson v. Johnson, 414 S.W.2d 235 (Tex. Civ. App. 1967) *error ref. n.r.e.* (defendant who moves for summary judgment on whole case must show that plaintiff has no cause of action or that the claim is barred as a matter of law by an affirmative defense); Rice v. Tucson Credit Union, 413 S.W.2d 833 (Tex. Civ. App. 1967) (motion having support in extrinsic evidence cannot be overcome by mere sworn denial); Street v. Hannasch, 410 S.W.2d 941 (Tex. Civ. App. 1967) (uncertified copy of deficiency judgment did not bar summary judgment); Castle v. Appliance Buyers Credit Corp., 410 S.W.2d 485 (Tex. Civ. App. 1966) (proper where only defense to suit on note due and payable is inadequacy of consideration); Dover v. Casualty Reciprocal Exch., 410 S.W.2d 306 (Tex. Civ. App. 1966) (summary judgment for plaintiff in workmen's compensation suit does not bar later suit for medical compensation in future); Fant v. Howell, 410 S.W.2d 294 (Tex. Civ. App. 1966) *error dismissed* (allegation on information and belief improperly treated as admission for summary judgment); Seldon v. S. & S. Aggregates Co., 410 S.W.2d 231 (Tex. Civ. App. 1966) *error ref. n.r.e.* (summary judgment as to liability); Vanlandingham v. First Sav. & Loan Ass'n, 410 S.W.2d 218 (Tex. Civ. App. 1966) *error ref. n.r.e.* (improper in slip and fall case where customer's affidavit did not foreclose fact question as to knowledge of slippery condition of floor); Gunn v. State, 410 S.W.2d 207 (Tex. Civ. App. 1966) (driver's license suspended); West v. Southern Life & Health Ins. Co., 409 S.W.2d 581 (Tex. Civ. App. 1966) *error ref. n.r.e.* (not abuse of discretion to refuse consideration of untimely reply and affidavit to defendant's motion for summary judgment); Dorman v. Malloy, 408 S.W.2d 138 (Tex. Civ. App. 1966) *error ref. n.r.e.* (fact issue raised as to adverse possession claim and trial court improperly passed on credibility of affidavit); Rice v. Travelers Express Co., 407 S.W.2d 534 (Tex. Civ. App. 1966) (severance of causes of action); Nelms v. Shotola, 407 S.W.2d 266 (Tex. Civ. App. 1966) (not appropriate in suit for broker's commission where fact issue as to sales price is presented); Frantz v. Frantz, 406 S.W.2d 745 (Tex. Civ. App. 1966) (lack of genuine issue of fact assumed on appeal in absence of statement of facts).

Jurisdictional Amount: Gordon v. Carver, 409 S.W.2d 878 (Tex. Civ. App. 1966) (items involved in suit where value totaled $201, were severable and suit was properly maintainable in justice court); Texas Employment Comm'n v. Checker Cab Co., 407 S.W.2d 871 (Tex. Civ. App. 1966) *error ref. n.r.e.* ("charge back" of benefit wages for $512.80 against employer's account with state Commission did not allege sufficient jurisdictional amount to maintain suit in district court where employer's payroll taxes would not have increased in any amount).

Jury: American Bankers Ins. Co. v. Fisk, 412 S.W.2d 723 (Tex. Civ. App. 1967) (denial of jury trial not abuse of discretion under facts); Eleventh Street Baptist Church v. State, 410 S.W.2d 228 (Tex. Civ. App. 1966) (alleged jury misconduct); Wilkerson v. Darragh & Lyda, Inc., 408 S.W.2d 542 (Tex. Civ. App. 1966) (polling jury); Hughes v. Hughes, 407 S.W.2d 14 (Tex. Civ. App. 1966) (denial of jury trial must be preserved in record); Texas Employers' Ins. Ass'n v. Baxter, 407 S.W.2d 7 (Tex. Civ. App. 1966) *error ref. n.r.e.* (time limit on opening argument); Potts v. Joske's, 406 S.W.2d 535 (Tex. Civ. App. 1966) (jury misconduct—discussion of insurance).

Mandamus: Davis v. Barnes, 413 S.W.2d 105 (Tex. 1967) (mandatory legislative continuance does not have to be entertained and granted by supreme court when jurisdiction invoked after trial and trial judge thereafter granted motion for new trial); Duval Corp. v. Sadler, 407 S.W.2d 493 (Tex. 1966) (supreme court has jurisdiction to determine under which statute land commission should act); Leggit v. Nesbitt, 415 S.W.2d 696 (Tex. Civ. App. 1967) (action abated when regular official resumes post and acting official resigns prior to trial); Lee v. McKay, 414 S.W.2d 956 (Tex. Civ. App. 1967) *error dismissed* (parents entitled to appeal judgment in juvenile proceedings without filing an appeal bond); Wolf v. Petty, 414 S.W.2d 539 (Tex. Civ. App. 1967) (to force consolidation election); Donald v. Carr, 407 S.W.2d 288 (Tex. Civ. App. 1966) (court of appeals cannot issue unless facts are beyond dispute); Coleman v. Long, 407 S.W.2d 279 (Tex. Civ. App. 1966) (to direct judge to affirm affidavit of inability to pay costs of appeal).

Motion To Appoint Guardian Ad Litem: Gallegos v. Clegg, 417 S.W.2d 347 (Tex. Civ. App. 1967) *error ref. n.r.e.* (refusal at trial court to grant motion of father who could not read or write English was reversible error).

Motion for Continuance: Lopez v. Columbus Quarter Horse Ass'n, 409 S.W.2d 478 (Tex. Civ. App. 1966) (motion failed to show diligence in attempting to secure testimony of absent witness).

Motion for Instructed Verdict: Pickford v. Broady, 411 S.W.2d 747 (Tex. Civ. App. 1966) (improperly granted where proximate cause of accident might have been negligence of defendant); Texas Constr. Rentals, Inc. v. Harrison, 410 S.W.2d 482 (Tex. Civ. App. 1966) *error ref. n.r.e.* (waived if defendant proceeds with introduction of evidence).

Motion for New Trial:

Court's Discretion: Neuhoff Bros. Packers, Inc. v. Brooks, 410 S.W.2d 298 (Tex. Civ. App. 1966) (no abuse shown in refusing to hear jurors' testimony where movant alleged jury misconduct but produced no supporting affidavits or excuse for absence of such).

Grounds: Graham v. Truck Equip. Co., Inc. 413 S.W.2d 778 (Tex. Civ. App. 1967) (motion must allege facts which in law constitute a meritorious defense and not just claim that movant has a meritorious defense after default judgment rendered); Gavrel v. Young, 407 S.W.2d 518 (Tex. Civ. App. 1966) *error ref. n.r.e.* (movant must be specific in assignments of error).

New Evidence: Missouri Pac. R.R. v. Hesse, 417 S.W.2d 379 (Tex. Civ. App. 1967) *error ref. n.r.e.* (insufficient where alleged new evidence failed to show fraudulent purpose on plaintiff's part in workmen's compensation suit); Austin v. Gallaher, 417 S.W.2d 363 (Tex. Civ. App. 1967) *error dismissed* (movant must show that he used due diligence in discovering evidence and evidence must not be merely cumulative of that already received); McBroom v. Souther, 410 S.W.2d 303 (Tex. Civ. App. 1966) (information obtained after trial as to jury misconduct); State v. Curtis, 409 S.W.2d 622 (Tex. Civ. App. 1966) (impeachment evidence designed to discredit witness, insufficient to justify new trial).

Time Limits: Washington v. Golden State Mut. Life Ins. Co., 405 S.W.2d 856 (Tex. Civ. App.), *error ref., per curiam*, 408 S.W.2d 227 (1966) (time from which filing date of appeal bond calculated, order overruling motion for new trial is deemed rendered on date signed—TEX. R. CIV. P. 306a); Scarborough v. Scarborough, 406 S.W.2d 277 (Tex. Civ. App. 1966) (tardy motions will not extend time limit for appeal).

Motion To Reopen Case: B & H Auto Supply, Inc. v. Andrews, 417 S.W.2d 341 (Tex. Civ. App. 1967) (not abuse of discretion to deny motion).

Parties: Flowers v. Steelcraft Corp., 406 S.W.2d 199 (Tex. 1966) (defendant must prove incorrect party was sued where two parties have identical name); Hughes v. Atlantic Ref. Co., 416 S.W.2d 619 (Tex. Civ. App. 1967) *error granted* (suit dismissed for want of necessary parties); Inter-Continental Corp. v. Moody, 411 S.W.2d 578 (Tex. Civ. App. 1966) *error ref. n.r.e.* (minority stockholder should be allowed to intervene in suit against corporation for alleged ultra vires act); Ellen v. City of Bryan, 410 S.W.2d 463 (Tex. Civ. App. 1966) *error ref. n.r.e.* (thirty-six citizens allowed to intervene in nuisance suit where all they did was adopt city's pleadings); San Angelo Tank Car Line, Ltd. v. Lawyers Sur. Corp., 407 S.W.2d 23 (Tex. Civ. App. 1966) *error ref. n.r.e.* (surety not liable in absence of execution and delivery of replevy bond).

Indispensable Parties: Petroleum Anchor Equip., Inc. v. Tyra, 406 S.W.2d 891 (Tex. 1966) (purchaser of patent is not an indispensable party in suit between seller and assignee of purchaser).

Standing: Avery v. Midland County, 406 S.W.2d 422 (Tex. 1966), *cert. granted*, 388 U.S. 354 (1967) (redistricting of county precincts); East Texas Life & Accident Ins. Co. v. Carver, 407 S.W.2d 251 (Tex. Civ. App. 1966) *error dismissed* (insured retains right to sue insurer after assignment of benefits to hospital).

Pleadings: Southwestern Bell Tel. Co. v. West, 417 S.W.2d 297 (Tex. Civ. App. 1967) *error ref. n.r.e.* (abuse of discretion to not allow pleadings to be amended); South Texas Lumber Stores, Inc. v. Cain, 416 S.W.2d 530 (Tex. Civ. App. 1967) (parties may withdraw announcement of ready at any time before case is submitted to jury, and pleadings may then be amended); J. Hofert Co. v. Inman, 416 S.W.2d 461 (Tex. Civ. App. 1967) (improper to render judgment for less than plaintiff asked for in action on sworn account where defendant's denial unsworn to—TEX. R. CIV. P. 185); Ball v. Cooper-Stanley Co., 413 S.W.2d 467 (Tex. Civ. App. 1967) (a "special contract" cannot be considered a "sworn account" for purposes of TEX. R. CIV. P. 185); Akin v. Akin, 412 S.W.2d 765 (Tex. Civ. App. 1967) (conclusions contained in affidavit, pleadings could not raise fact issue so as to bar summary judgment); Payne v. Hartford Fire Ins. Co., 409 S.W.2d 591 (Tex. Civ. App. 1966) *error ref. n.r.e.* (special answer alleging common scheme on part of defendant in setting fire to collect insurance); Garver v. First Nat'l Bank of Canada, 406 S.W.2d 797 (Tex. Civ. App. 1966) (action cannot be dismissed because pleadings fail to state cause of action unless opportunity to amend is allowed first).